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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CHEVRON CORPORATION, *et al.*,
Petitioners,
v.
STATE OF ARIZONA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY MEMORANDUM

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REPLY MEMORANDUM

The Ninth Circuit in this case has significantly lowered the threshold showing that must be made to justify jury trial and the assessment of treble damages in conspiracy cases under section 1 of the Sherman Act, 15 U.S.C. § 1. The court's holding directly conflicts not only with *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), but also with numerous decisions in other circuits that faithfully follow *Matsushita* by affirming entry of summary judgment where, as here, plaintiffs offer evidence that is no more consistent with conspiracy than with lawful independent action. *See* Pet. 11-12. In ruling, instead, that such evidence affords a sufficient basis for trial, the Ninth Circuit has seriously weakened the effectiveness of summary judgment as a tool for weeding out meritless cases. Moreover, by sanc-

tioning the imposition of liability based on nothing more than lawful parallel pricing together with press releases (or responses to press inquiries) concerning prices, the Ninth Circuit has discarded the basic statutory requirement of concerted action. These erroneous rulings go to the heart of antitrust law and practice.

Respondents now adopt three strategies in arguing that the decision below does not warrant review. They pretend that the Ninth Circuit actually applied the same standard this Court articulated in *Matsushita*; they disregard the true scope of the Ninth Circuit's holding with respect to parallel pricing and price announcements; and they distort the factual record in an effort to suggest that the Ninth Circuit's radical revision of the *Matsushita* standard was not necessary to its decision.

1. *Respondents baldly misstate the standard that the Ninth Circuit applied.* In *Matsushita* this Court held that an antitrust defendant's motion for summary judgment cannot be defeated by circumstantial evidence that is "as consistent with permissible competition as with illegal conspiracy" and that does not "tend[] to exclude" the possibility of lawful independent action. 475 U.S. at 588. The Ninth Circuit does not like that test and refused to apply it. It held instead that a defendant's motion can be defeated by any evidence from which a conspiracy may plausibly be inferred, irrespective of the force of the competing inference of lawful independent action, so long as the court considering the motion is satisfied that permitting an inference of conspiracy would not "deter[] significant procompetitive conduct." Pet. App. A at 11a. The Ninth Circuit thus has constructed a new, non-statutory barrier to the entry of summary judgment.

Respondents offer a different reading of the opinion below. According to respondents, the Ninth Circuit departed from *Matsushita*, but only by articulating and applying a test that places an additional burden on

plaintiffs. They claim the court held that "if the plaintiff introduces evidence that 'tends to exclude' the possibility of independent action, summary judgment may nevertheless be appropriate if the inference that the plaintiff requests would deter significant procompetitive conduct." Br. in Opp. 13. Both the literal text of the Ninth Circuit's reformulated *Matsushita* standard and the way in which the court applied it demonstrate that respondents have the matter precisely backwards.

Under the Ninth Circuit's test, in order to obtain summary judgment a *defendant* first must show that "(1) the defendant's conduct is consistent with other plausible [*i.e.*, innocent] explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." Pet. App. A at 13a. If the defendant cannot satisfy the second prong of this test—a prong that even respondents implicitly concede cannot be found in either *Matsushita* or the Sherman Act—the plaintiff is not required to show even that the evidence is as consistent with illegal conspiracy as with lawful conduct, let alone that it tends to exclude such conduct. The "tends to exclude" test itself is never even reached unless the defendant establishes that it was engaged in "beneficial procompetitive behavior": as the Ninth Circuit stated explicitly, it is only "[o]nce the defendant has made such a showing, [that] the plaintiff must come forward with other evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully." *Id.* at 14a.

The Ninth Circuit's reworking of *Matsushita* obviously erects an additional hurdle that *defendants* must surmount. The court was motivated by the misguided concern that otherwise a plaintiff's "circumstantial evidence alone would rarely be sufficient to withstand summary judgment." *Id.* at 10a. Respondents' suggestion that the Ninth Circuit actually is requiring *plaintiffs* to present *more* than "unambiguous evidence of collusion," Br. in Opp. 13, is patently incorrect.

Respondents' similar contention, that the Ninth Circuit actually applied the "tends to exclude" test, is equally insubstantial. To be sure, the court quoted *Matsushita*'s reference to that test, but it then promptly explained why the test should not be applied in the straightforward manner that this Court intended. *See* Pet. App. A at 8a-14a. And in fact the Ninth Circuit did not apply that test. The Court's failure to do so was outcome-determinative. It suffices to give two examples.

(1) After concluding that a conspiracy could plausibly be inferred from mere price parallelism plus evidence that some petitioners issued press releases when they raised their prices, the Ninth Circuit proceeded to explain why "permitting such an inference poses [no] problem under *Matsushita*":

> We agree that it is plausible to contend that independent considerations of self-interest would have led a company to choose to publish a price increase that it had decided to make. That does not settle the inquiry, however; the question remains whether permitting an inference of conspiracy from the fact of such publication would significantly deter important legitimate conduct.

Id. at 28a-29a. Because the court saw "no significant probability that permitting the proffered inference would deter important legitimate conduct," it held that a jury should be permitted to "decide whether [petitioners'] actions were undertaken pursuant to an agreement or understanding concerning prices or whether their activities were simply noncollusive and independent." *Id.* at 29a, 30a. In so holding, the Ninth Circuit *never even considered* whether the evidence tended to exclude the possibility of lawful independent action (and of course the evidence did not tend to exclude that possibility).

(2) In holding that respondents had "offered a plausible conspiracy theory" with respect to the shortage of gasoline, *id.* at 60a, the Ninth Circuit refused to consider

petitioners' submission that "the evidence indicates normal [lawful] business behavior." *Id.* at 64a. The court explained:

> it is not our task to decide whether we think that an inference of innocent conduct is more plausible than an inference of conspiracy. Rather, our task is to consider whether an inference of conspiracy is plausible and whether permitting such an inference would have the effect of deterring significant procompetitive conduct.

Id. The court held that respondents were entitled to put their theory before a jury because petitioners had failed to show any "procompetitive behavior that would be deterred," *id.*—once again, *without even mentioning* the "tends to exclude" test (which, once again, respondents' evidence did not satisfy).

In short, far from requiring respondents to show that their circumstantial evidence tends to exclude lawful independent action, the Ninth Circuit did not even require them to show that the evidence was as consistent with illegal conspiracy as with permissible competition. It is as if this Court had never decided either *Matsushita* or *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984), or even *First National Bank v. Cities Service Co.*, 391 U.S. 253, 280 (1968). This Court should grant review to correct the Ninth Circuit's radical departure from settled law.

2. *Respondents ignore the Ninth Circuit's holding that parallel pricing plus price publication, with nothing more, can be found violative of the Sherman Act.* The Ninth Circuit held that a jury can, if it wants, infer the existence of a conspiracy on the basis of nothing more than parallel pricing plus price publication consistent with independent self-interest. Pet. App. A at 23a-30a. This transforms section 1 of the Sherman Act—a statute that on its face applies only to contracts, combinations, and conspiracies—into a discretionary prohibition against any

independent unilateral action that may serve to facilitate price leadership. *See* Pet. 19-25. To be sure, the Ninth Circuit would require a jury to find an agreement, but it would permit the jury to do so on legally insufficient evidence—without any "evidence to show that [the defendants'] behavior differs from that which would be expected under competitive conditions." Brief for the United States at 9, *Weyerhauser Co. v. Lyman Lamb Co.* (U.S.) (No. 81-1618), *cert. dismissed*, 426 U.S. 1125 (1983).

Respondents apparently understand that the Ninth Circuit erred. That presumably is why they seek to camouflage the court's actual holding with factual assertions that the court itself did not rely upon. *Compare* Br. in Opp. 17-18 *with* pp. 6-8, *infra*. The Ninth Circuit's manifest error in permitting liability to be imposed merely for announcing prices—an error that flowed immediately from its new and improper standard for antitrust summary judgment—should be reviewed and corrected before it spawns imitative litigation and causes widespread harm.

3. *Respondents distort the record in an effort to create the impression that it justifies the result below.* This case arises on motions for summary judgment, where the underlying evidentiary facts are undisputed. Respondents nonetheless refer repeatedly to the district court's "factual findings," *e.g.*, Br. in Opp. 7, and assert without citation to the record that those "findings" were "reversed" by the Ninth Circuit on *de novo* review. *Id.* at 8. That plainly is wrong. Neither court made findings. Each court reviewed the same record without any disagreement concerning the underlying evidentiary facts.

Nor did the courts appear to disagree concerning the inferences that hypothetically could be drawn from the facts. The district court acknowledged that the facts "could be considered to be in harmony with the existence of a conspiracy if the existence of a conspiracy be assumed," Pet. App. B at 71a, but pointed out that the

"facts are at least as consistent with a finding of individual action and vigorous competition." *Id.* at 96a. The Ninth Circuit used different language but to the same effect. It characterized the respondents' inference of conspiracy as "plausible," *e.g.*, Pet. App. A at 64a, but like the district court also acknowledged that the facts were consistent with "independent considerations of self-interest." *Id.* at 28a. Where the courts below parted company was not on the facts or possible inferences therefrom but on the legal standard to be applied to those facts in determining whether to grant summary judgment.

Rather than defend the test actually applied by the Ninth Circuit, respondents argue that there was, in fact, evidence which tended to exclude the possibility that petitioners acted independently. But a review of the Ninth Circuit's opinion demonstrates that respondents have obscured the limited significance of much of the evidence in order to create the impression that their case is far stronger than even the Ninth Circuit believed it to be. It is sufficient here to discuss two salient examples.

(1) Although respondents emphasize the "substantial evidence" of "telephone contacts . . . for the express purpose of verifying [existing] prices," Br. in Opp. 4, 8, they fail to mention that such contacts ceased almost entirely by 1969. *See* Pet. App. A at 34a-35a. The Ninth Circuit acknowledged that such dated evidence could be relevant to claims within the limitations period only in "establishing [petitioners'] intent and motive in publicizing [their prices]." *Id.* at 35a. The evidence thus is merely cumulative of the testimony of various petitioners that they announced price changes, at least in significant part, in the hope that others would quickly learn about the changes and follow suit. *See id.* at 24a-25a. The court indicated, moreover, that the "fragmentary" contacts to verify prices that occurred after 1969 had no persuasive force "standing alone," *i.e.*, apart from the evidence of price publication. *Id.* at 42a.

(2) Respondents' much-trumpeted "*direct* evidence of oil company contacts with unbranded independent marketers," Br. in Opp. 4 (emphasis in original), which looms so large in their account of the facts, *see, e.g., id.* at 4, 8-9, 12, 17, is analytically irrelevant here. As the Ninth Circuit itself recognized, this "direct evidence" constituted inadmissible hearsay against all petitioners other than Chevron Corporation (the corporate successor to both Standard Oil Company of California and Gulf Oil Corporation) in the absence of sufficient other evidence to support a finding of conspiracy among petitioners. *See* Pet. App. A at 51a. The only such evidence cited by the Ninth Circuit to clear this hearsay hurdle was the very same circumstantial evidence that the court incorrectly had held sufficient to warrant trial under its ill-founded reformulation of *Matsushita*. *Id.* at 52a-53a. But for that erroneous ruling, there is *no* direct evidence that creates a triable issue of conspiracy against the petitioners—even "on the discrete issue of independent dealer contacts." *Id.* at 53a n.21.

There can be no serious dispute concerning the nucleus of facts that the Ninth Circuit considered dispositive in holding that there must be a trial on respondents' allegation of a price-fixing conspiracy: "we believe that the evidence concerning the purpose and effect of *price announcements*, when considered together with the evidence concerning the *parallel pattern of price restorations*, is sufficient to support a reasonable and permissible inference of an agreement, whether express or tacit, to raise or stabilize prices." Pet. App. A at 26a (emphasis added). That is the true factual core of this case. And, as petitioners have shown, that evidence is no more consistent with conspiracy than with lawful independent action.

For the reasons stated here and in the petition, review should be granted.

Respectfully submitted,

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